IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. .....

THE MACCABEES AND MODERN WOODMEN OF AMERICA,
Petitioners,

vs.

MRS. FLORENCE S. CARTER,
Respondent.

REPLY BRIEF

Of Respondent, Mrs. Florence S. Carter, in Opposition to Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners, The Maccabees and Modern Woodmen of America, are fraternal benefit societies incorporated under the laws of the States of Michigan and Illinois, respectively, and were engaged in writing life and accident insurance policies in Tennessee, and issued certain policies in that State on the life of respondent's husband, John T. Carter (Rec. 2, 4, 8, 9, 15). Insured was accidentally killed June 13, 1946 (Rec. 33). Petitioners refused to pay respondent, the beneficiary of the policies, after due proof of insured's accidental death was furnished them and

formal demand made for the payment of the policies, and to recover on the policies respondent brought two separate actions, which were consolidated and tried together in the United States District Court at Nashville.

Upon special issues submitted to the jury, there was a finding that the refusal of both petitioners to pay the policies sued upon was "not in good faith," and that petitioners' refusal had caused respondent additional loss and expense in an amount in excess of twenty-five per cent of the amount demanded by respondent (Rec. 32, 33). The District Judge approved the verdict of the jury and upon it entered judgment for the amount of the policies sued upon, and interest thereon, and twenty-five per cent additional as provided by Section 6434 of the Tennessee Code to reimburse respondent for the cost and expense incurred by reason of petitioners' bad faith in refusing to pay respondent as they had contracted to do (Rec. 51, 52).

JUDGMENT OF CIRCUIT COURT OF APPEALS.

Following the overrulement by the District Judge of petitioners' motion for a new trial, both petitioners appealed the consolidated cause to the Court of Appeals for the Sixth Circuit (Rec. 65). The cause was argued and submitted in that court on April 6, 1950, before Judges Allen, Martin and McAlister, which four days later, on April 10, 1950, held that the verdict of the jury was supported by substantial evidence; that under Tennessee law fraternal benefit societies fall within the purview of and are governed by the provisions of **Section 6434** of **Williams' Tennessee Code**, as held by the Tennessee Supreme Court in the cases of **Snyder v. Mystic Circle**, 122 Tenn. 248, 268, 122 S. W. 981, and **Kidd v. National Council J. O. U. A. M.**, 137 Tenn. 398, 406, 193 S. W. 130; and there being no reversible error the judgment of the District Court was in all things affirmed (Rec. 559).

Judge Martin is a former **Tennessee** Federal Judge, an able jurist familiar with the laws of **Tennessee,** and his opinion is entitled to great weight.

Continuing to litigate, petitioners on May 4, 1950, filed a petition for rehearing in the United States Court of Appeals, which was denied on May 29, 1950 (Rec. 559, 591).

Still not satisfied, petitioners, who were found guilty by the two lower courts of having refused **in bad faith to comply with their contracts,** and making no contention here that there is not substantial evidence to support the judgment of the two lower courts, have petitioned this Honorable Court **to exercise its discretion** and grant a writ of certiorari and hold that **under Tennessee law** said **Section 6434** of the **Tennessee Code,** creating additional liability upon insurers for failure to pay insurance losses, when refusal to pay is in **bad faith,** has no application to fraternal benefit societies or associations writing insurance in Tennessee.

QUESTION PRESENTED.

The only question involved is whether under **Tennessee law** petitioners fall within the purview of **Section 6434** of the **Tennessee Code.**

REASONS WHY THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY POWER TO GRANT THE WRIT OF CERTIORARI PRAYED FOR.

1.

The Court of Appeals for the Sixth Circuit has not rendered a decision in this case in conflict with the decision of another Circuit Court of Appeals on the same matter.

Railway Mail Assn. v. Chamberlain, 148 Fed. (2d) 206; Opinion of Sixth Circuit Court in this case, Rec. 559.

2.

The Circuit Court of Appeals for the Sixth Circuit has not decided any question of **Tennessee law** in conflict with an applicable local decision.

Brotherhood of Railroad Trainmen v. Daniels, 18 Tenn. App. 264, 75 S. W. (2d) 1019;
Section 6434, Williams' Tenn. Code;
Snyder v. Mystic Circle, 122 Tenn. 248, 268, 122 S. W. 981;
Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406, 193 S. W. 130;
Tobin v. Estes, 168 Tenn. 403, 407, 79 S. W. (2d) 550;
Supreme Ruling of the Fraternal Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292.

3.

This Court will not attempt to determine the **law of Tennessee** construing **Section 6434** of the **Tennessee Code** if such construction has **not** been given by the court of last resort of that state, but in the absence of such guidance will leave undisturbed the interpretation placed upon this purely local law by a Tennessee United States District Judge of long experience who tried the case **in Tennessee**, and affirmed by the three United States Circuit Judges, one of whom is a former United States District Judge **in Tennessee**, which state is included in the Sixth Circuit.

MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280, 86 L. ed. 846, 62 S. Ct. 607;
Helvering v. Stuart, 317 U. S. 154, 87 L. ed. 154, 63 S. Ct. 140.

"No decision of the Supreme Court of Michigan, or of any other court of that state, construing the relevant Michigan law, has been brought to our attention. In the absence of such guidance we will leave undisturbed

the interpretation placed upon purely local law by a Michigan Federal Judge of long experience, and by three Circuit Judges whose circuit includes Michigan."

MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280, 281, 86 L. ed. 846, 848, 62 S. Ct. 607.

4.

The Court of Appeals for the Sixth Circuit has not decided a question of **Tennessee law** in conflict with the weight of **Tennessee cases**, but, to the contrary, in accord with them.

Snyder v. Mystic Circle, 122 Tenn. 248, 268, 122 S. W. 981;

Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406, 193 S. W. 130;

Tobin v. Estes, 168 Tenn. 403, 407, 79 S. W. (2d) 550.

BRIEF AND ARGUMENT.

Section 6434 of the **Tennessee Code** was taken from **Chapter 141, Section 1, Acts 1901,** which provides:

> "6434. **Additional liability upon insurers for failure to pay promptly insurance losses when refusal is not in good faith.** The insurance companies of this state, and foreign insurance companies **and other persons doing an insurance business in this state,** in all cases where a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed (1901, ch. 141, sec. 1)." (Emphasis ours.)
>
> Williams' Tenn. Code, Sec. 6434.

We have emphasized in the foregoing section the words "and other persons doing an insurance business in this state," which are all-inclusive, to show that the statute covers not only Tennessee insurance companies and foreign insurance companies, **but all other persons doing an insurance business in Tennessee.** This was intended, of course, to include fraternal insurance companies or any other person or persons, by whatsoever designated name.

The same **Code, Section 14**, provides:

> "Definitions.—Words used in this Code in the past or present tense include the future. Words importing the masculine gender include the feminine and neuter; singular includes the plural and the plural the singular; **the word 'person' includes a corporation, firm or association**; . . ." (Emphasis ours.)

Reading **Section 6434** of the **Code** with **Section 14**, the former may be treated as if it contained the following language:

> "The insurance companies of this state, and foreign insurance companies and other persons (including a corporation, firm or association) doing an insurance business in this state," shall be liable, etc.

By **Chapter 480, Acts 1905**, the Tennessee Legislature enacted a statute entitled, "An Act to provide for the organization, admission and regulation of fraternal beneficiary associations transacting the business of life insurance; and to repeal all laws in conflict with the provisions of this Act." **Section 4** of this **Act** provides:

> "Be it further enacted, that except as herein provided, such associations shall be covered by this Act, and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter passed shall apply to them unless they be expressly designated therein."

This is the same language which was later to appear in **Section 6360** of the **Tennessee Code.** It is this section that petitioners insist is an "exemption statute" which permits them to escape from **Section 6434** of the Code providing additional liability upon insurers who refuse in bad faith to comply with their contracts.

Long after the passage of **Chapter 480, Acts 1905**, or the so-called "exemption statute", and in fact at its September Term, 1909, the Supreme Court of Tennessee in the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, 268, 122 S. W. 981, had held that a fraternal benefit society was liable for the additional liability imposed by **Section 1, Chapter 141, Acts 1901** (later to become **Section 6434** of the Code), for its refusal when not in good faith to pay its losses, and the court imposed twenty-five per cent additional liability on the Mystic Circle for its bad faith refusal to pay the amount of its life insurance policy issued to Snyder.

The Mystic Circle attacked the constitutionality of said **Chapter 141, Acts 1901.** The court would not have permitted the Mystic Circle, a fraternal benefit society, to raise the question of the constitutionality of the Act unless it had application to fraternal benefit societies.

Motor Transportation Co. v. Carden, 164 Tenn. 416, 423, 50 S. W. (2d) 230;
Cheatham County v. Murff, 176 Tenn. 93, 105, 138 S. W. (2d) 430.

At that time **Section 4, Chapter 480, Acts 1905** (later to become **Section 6360, Code of 1932)** was in full force and effect.

This case was by writ of error taken to the Supreme Court of the United States, where it was decided February 24, 1913, in an opinion delivered by Mr. Justice Hughes. **Mystic Circle v. Snyder,** 227 U. S. 497, 57 L. ed. 611. This Court held **Chapter 141, Acts 1901,** of the Tennessee Legislature constitutional and valid, and pointed out:

> "The statute is aimed not at the rights secured by the contract, but at dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso. It is only when it is 'made to appear to the

court or jury trying the case that the refusal to pay said loss was not in god faith' that the added recovery may be had. It must also appear that such refusal inflicted 'additional expense, loss, or injury' upon the policy holder, and it is this further expense, loss, or injury that measures the amount to be allowed, which is not to exceed twenty-five per cent of the liability on the policy."

Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611.

This Court would not have permitted the Mystic Circle to have questioned the constitutionality of the Act unless fraternal benefit associations or societies such as the Mystic Circle were covered by its provisions.

Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 463, 89 L. ed. 1725, 1736, 65 S. Ct. 1384;
Coffman v. Breeze Corporations, Inc., 323 U. S. 316, 325, 89 L. ed. 264, 271, 65 S. Ct. 298.

That such fraternal benefit society was liable under said Act, if it refused in bad faith to pay the holders of its policies, was recognized by the Tennessee Supreme Court in the case of **Kidd v. National Council J. O. U. A. M.**, 137 Tenn. 398, 406, 193 S. W. 130, later decided in the year 1916. In this case, which was tried in the lower court without the intervention of a jury, the Supreme Court of Tennessee held that upon the facts developed at the hearing, the society was not acting in bad faith in declining to pay the policy or certificate sued upon, and for that reason denied the imposition of additional liability.

Chapter 172, Acts 1921, of the Tennessee Legislature was passed April 9, 1921. **Section 4** of this **Act** is in the same words as **Section 4, Chapter 480, Acts 1905.** Section 6360 of the Code, or what the petitioners term the "exemp-

tion statute", is in the same words as **Section 4, Chapter 172, Acts 1921.**

ADOPTION OF TENNESSEE CODE IN 1931.

In 1931 the Legislature of Tennessee adopted an Official Code, which became effective January 1, 1932 (Sec. 26, Vol. 1, Williams' Tenn. Code). The Code is a comprehensive act of the Legislature of Tennessee and all sections took effect contemporaneously. Woodruff v. City of Nashville, 183 Tenn. 483, 192 S. W. (2d) 1013. At the time the Code was adopted in 1931 it had been understood by the bench and bar of Tennessee since at least September, 1909, when the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, was decided, that fraternal insurance societies were liable under **Section 1, Chapter 141,** Acts 1901, when their refusal to pay their policies or certificates was not in good faith. This understanding of the law was reaffirmed by the case of **Kidd v. National Council of J. O. U. A. M.,** supra, decided in 1916.

NO CHANGE GOVERNING RIGHTS OF PARTIES MADE BY TENNESSEE CODE.

As has been shown, the **1932 Official Code** of Tennessee made no change in the statutes of the state involving the rights of the parties in controversy, from what they were in September, 1909, when the Supreme Court of Tennessee decided the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, and in December, 1916, when the case of **Kidd v. National Council J. O. U. A. M.,** 137 Tenn. 398, was decided.

The **1932 Tennessee Official Code** is divided into chap. ters. **Chapter 6** is devoted entirely to insurance and insurance companies. **Williams' Tenn. Code, Vol. 4, end of Sec. 6083. Chapter 6** is divided into sixteen separate articles. **Williams' Tenn. Code, Vol. 4,** end of Sec. 6083. The sections of the **Code** appearing under these sixteen articles

begin at **Section 6084** and end with **Section 6459.42.** These deal with various types of insurance companies, including non-assessment life insurance, life and casualty insurance upon the assessment plan, insurance brokers, life insurance agents, fire, indemnity and casualty agents, domestic, mutual or assessment fire insurance companies, state mutual companies, county mutual companies, fire and marine companies, fraternal benefit societies or associations, voting trust agreements for life insurance companies, regulation of industrial, health, life or accident insurance companies, and contain various statutes relating to the insurance laws in Tennessee too numerous to mention herein.

Standing separately and alone is the so-called "penalty statute," in two sections, and to which **Chapter 6, Article 10,** of the **Code is exclusively devoted.** One of these is **Section 6434,** hereinbefore quoted, creating additional liability upon insurers for failure to comply with their contract, when the refusal to pay is in bad faith. The other is **Section 6435,** which imposes additional liability on policy holders in favor of "such insurance company, corporation, firm or person, in a sum not exceeding twenty-five per cent of the amount of the loss claimed under said policy", when the suit was not filed in good faith. Neither of these sections of the Code is restrictive. The Legislature did not intend for any domestic or foreign insurance company, or other persons, including fraternal benefit associations or societies "doing an insurance business in this state", to attempt to escape just obligations, but intended to impose additional liability upon all of them when "the refusal to pay said loss was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy."

On the other side, clearly it was the legislative intent that under **Section 6435** any holder of a policy, whether it

be issued by a domestic or foreign insurance company, "or other persons doing an insurance business in this state," was entitled to recover of such policy holder when an action was brought by the holder and "said suit was not in good faith," recoverable in an amount not exceeding twenty-five per cent of the amount of the loss claimed under the policy.

Under **Sections 6434** and **6435** of the **Code** no exceptions were created. It is well settled in Tennessee that where no exceptions are made in the provisions of a statute, the courts will not create any exceptions. **Forrest v. State,** 154 Tenn. 13, 285 S. W. 589. When the Legislature in **Section 6434** of the **Code** provided that it should apply to both domestic and foreign insurance companies, and still further that it should include "**and other persons doing an insurance business in this state,**" by the express language of the statute it included fraternal benefit associations or societies, and **every legal entity doing an insurance business in the state, regardless of the name.**

It must not be overlooked that **Section 6360** or the so-called "exemption section" does not provide that fraternal benefit societies shall not be liable for additional liability in the event they fail in bad faith to pay a loss within sixty days after formal demand is made therefor, but it only provides that "**no law hereafter enacted**" shall apply to them unless they be expressly designated therein.

Section 6434 or the so-called "penalty section," and **Section 6360** or the so-called "exemption section," were passed and enacted into law contemporaneously.

NO CONFLICT OF STATUTES.

There is no conflict between **Section 6430** or the "penalty section," and **Section 6360** or the so-called "exemption section," of the Code.

In the case of **Tobin v. Estes**, 168 Tenn. 403, 407, 79 S. W. (2d) 550, the same identical insistence was made in the Supreme Court of Tennessee as petitioners make here. **Section 2, Article 3, Chapter 13, Public Acts of the Second Extraordinary Session of 1931**, provided that "each insurance agent, solicitor, member of a firm, except those representing domestic, state and county mutual fire insurance companies, shall for the purpose of soliciting or writing insurance in this state pay a privilege tax," etc. The agent of the Modern Woodmen of America, which is one of the petitioners, and one of its attorneys here, contended that the agent was not liable for the privilege tax. The Supreme Court of Tennessee rejected the argument and held that it could not except or exempt fraternal benefit society agents from the tax when the Legislature had not seen fit to do so.

Tobin v. Estes, supra, 407.

Petitioners also completely ignore in their effort to escape from **Section 6434** of the **Code**, for their refusal in bad faith to comply with their contracts, another well recognized rule of Tennessee statutory construction. A statute should be so construed, if possible, that every word shall have force and effect, and that no clause or word shall be superfluous or insignificant.

Memphis Street R. R. Co. v. Mayor etc., 44 Tenn. 406, 417.

It was not necessary for the Legislature to name the petitioners in **Section 6434** of the **Code** to include them. They clearly fall within the definition "and other persons doing an insurance business in this state." To hold otherwise would attribute to the Legislature an intention to prohibit fraud against the insurance companies of Tennessee, and foreign insurance companies, "and other persons doing an insurance business in this state," and to permit the fraternal benefit societies or associations writ-

ing insurance in Tennessee to refuse in bad faith to pay their obligations and escape with impunity.

IN ABSENCE OF A DECISION OF TENNESSEE COURT ON THE POINT, THE SUPREME COURT OF THE UNITED STATES WILL LEAVE UNDISTURBED AN INTERPRETATION PLACED ON A STATE STATUTE BY A LOCAL FEDERAL DISTRICT JUDGE AND BY THREE JUDGES OF THE CIRCUIT COURT OF APPEALS WHOSE CIRCUIT INCLUDES SUCH STATE.

Federal courts since the decision of **Erie R. R. Co. v. Tompkins,** 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 770, follow the statutes and the decisions of the court of last resort of the state in which the action is pending or whose laws are applicable to the issue.

West v. American Tel. & Tel. Co., 311 U. S. 223, 236, 85 L. ed. 139, 143, 144, 61 S. Ct. 179.

The United States District Judge for the Middle District of **Tennessee,** with years of experience, is presumed to have been familiar with the **Tennessee** statutes and the **decisions of its court of last resort,** which is the Supreme Court of Tennessee. He held that **Section 6434** of the **Code of Tennessee** was the law of the case as construed by the **Supreme Court of Tennessee,** and entered judgment for the additional liability against petitioners for their refusal in bad faith to pay the respondent, as found by the jury (Rec. 51, 52).

The United States Court of Appeals for the Sixth Circuit, which circuit includes **Tennessee,** held "that under Tennessee law fraternal benefit societies fall within the purview of, and are governed by, the provisions of Section 6434, Williams' Tennessee Code. Snyder v. Mystic Circle, 122 Tenn. 248, 268; Cf. Kidd v. National Council J. O. U. A. M., 137 Tenn. 398" (Rec. 559).

Judge John D. Martin, a former United States Judge for the Western District of **Tennessee**, and one of the six Judges for the Sixth Circuit, **participated** in the decision of this case (Rec. 559). He is a Judge of many years experience and familiar with **Tennessee** decisions.

Assuming for the moment that the Supreme Court of **Tennessee** had not decided the question raised in the petition for certiorari, it is now well settled that this Court will leave undisturbed an interpretation placed upon a state statute by a **local** Federal District Judge, and by the Judges of the Federal Circuit Court of Appeals whose circuit includes **such state.**

MacGregor, Extr., v. State Mutual Life Assur. Co., 315 U. S. 280, 281, 86 L. ed. 846, 848, 62 S. Ct. 607.

It is respectfully submitted that this Court may properly assume that the **Tennessee** Federal District Judge who tried this case knew the applicable law of **Tennessee**, and whose decision was found to be correct and affirmed by the United States Court of Appeals for the Sixth Circuit, with another Judge from **Tennessee** as a member of the three-judge court **participating** in the decision, which was unanimous (Rec. 559).

In petitioners' brief the case of **Brotherhood of Railroad Trainmen v. Daniels** (18 Tenn. App. Rep. 264), 75 S. W. (2d) 1019, is cited in support of a statement therein that a fraternal benefit society in Tennessee operating upon the assessment plan has its liability or non-liability determined by the common law and Tennessee statutes particularly applicable to it, and not by statutes applicable to life insurance companies. There is no criticism of this statement. Whether it was the law of Tennessee or material in the case was not before the court. It was pure dictum. However, the question of whether **Section 6434** of the Code, or the Tennessee additional liability or penalty statute, had

application, was not involved or not mentioned in the case. Additional liability or a penalty was not sued for. Liability was denied under the certificate sued upon for the reason that the insured had made a false statement in his application for insurance, concerning the condition of his health, and since Daniels, the insured, was a member of the Brotherhood of Railroad Trainmen which issued the certificate and was a fraternal benefit society, the by-laws and constitution of the Order were a part of the certificate. Under the laws of Tennessee the fraternal benefit society had a right to show that the certificate was obtained by fraud, which avoided the certificate.

The Court of Appeals is an intermediate court in Tennessee. Had its decision related in any respect to whether a fraternal insurance company is liable under **Section 6434** of the **Code**, its opinion would have no effect if in conflict in any respect with an opinion of the Tennessee Supreme Court. That court denied a writ of certiorari in the case. However, it is well settled in Tennessee that "a mere denial by this (Supreme) Court of a writ of certiorari to the Court of Appeals does not commit us to alter views expressed in a particular opinion. We are particularly concerned on such application with the result reached."

Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 611, 130 S. W. (2d) 85;

Powers v. L. & N. R. R. Co., 183 Tenn. 526, 528, 194 S. W. (2d) 241.

The case of **Brotherhood of Railroad Trainmen v. Daniels**, 18 Tenn. App. Rep. 264, was considered by the United States Court of Appeals for the Sixth Circuit. It is referred to and quoted from on page 39 of petitioners' original brief in the Circuit Court of Appeals, and in the petition to rehear on pages 7 and 8. It was undoubtedly considered by the Circuit Court of Appeals to have had no application whatever to this cause, as indeed it does not.

DECISIONS IN OTHER STATES CONSTRUING ADDITIONAL LIABILITY OR PENALTY STATUTES.

Space will not here permit a synopsis of the statutes of the states referred to which the cases cited by petitioners construe, holding they do not apply to fraternal insurance companies. An examination of the statutes of Arkansas, Georgia, Missouri and Texas will show that none of them are as broad as the Tennessee Code, Section 6434, or contain the all-inclusive language "and other persons doing an insurance business in this state."

To correct this imperfection in the Texas statute, the legislature of that state later amended the statute so as to include fraternal benefit societies.

Grand Lodge Free and Accepted Masons of Texas v. Walker (Tex. Civ. App.), 110 S. W. (2d) 945.

Many cases construing statutes in various states could be cited in which the courts held that under the particular language of the statute fraternal benefit societies were included, but it occurs to us that this is not necessary or helpful because we are concerned with a **Tennessee** statute. However, see **Lane v. Brotherhood of Locomotive Engineers**, 73 Pac. (2d) 1356 (Ore.); and **Bowen v. Railway Mutual Assoc.**, 54 Fed. (2d) 391 (D. C. Fla.).

The decisions of courts other than in Tennessee, construing the statutes of the respective states, were cited by petitioners in their original brief in the Circuit Court of Appeals (p. 40), and in their petition to rehear (pp. 17-22). These cases evidently were held by that Court to be inapplicable because it was dealing with a **broader Tennessee statute** and the **law of that state** as construed by its courts.

NO CONFLICT OF DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR SIXTH CIRCUIT IN THIS CAUSE WITH ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

In the brief of petitioners it is insisted that the decision of the Circuit Court of Appeals for the Sixth Circuit in this cause, holding petitioners liable under **Section 6434** of the **Tennessee Code** and **Tennessee cases,** is in conflict with the decision of the Court of Appeals for the Eighth Circuit in **Railway Mail Assn. v. Chamberlain,** 148 Fed. (2d) 206, with respect to **Arkansas** law. There can be no possible conflict in these decisions, because the decision of the Court for the Sixth Circuit in this cause relates to **Tennessee** law, whereas the decision in the Eighth Circuit relates to **Arkansas** law. However, a mere reading of the Eighth Circuit case will demonstrate no possible conflict. The question before the court in the Eighth Circuit case was whether the Railway Mail Association was an **accident** insurance company or **a fraternal benefit society.** It was conceded that if it was a fraternal benefit society, **Section 7670 of Pope's Digest of the Statutes of Arkansas** fixing a twelve and one-half per cent statutory penalty and attorney's fee had no application, since under the statutes of Arkansas fraternal insurance companies were not liable for said penalty or attorney's fee. In the course of the Court's opinion, Circuit Judge Sanborn said:

> "It is conceivable that the Supreme Court of Arkansas might, if this case were before it, hold that the Association is not a fraternal benefit society and is subject to the imposition of the statutory penalty and attorney's fee. The question is debatable and perhaps doubtful. There is no reason, however, why this court should overturn the ruling of the trial court upon this doubtful question of Arkansas law. In deciding what the highest court of a state would probably hold the state law to be, great weight may properly be ac-

corded by this Court to the view of the trial court. This Court would be justified in adopting a view contrary to that of the trial court, only if convinced of error."

Railway Mail Assn. v. Chamberlain, 148 Fed. (2d) 206, 208.

The Arkansas Supreme Court in **Gallagly v. American Ins. Union**, 20 S. W. (2d) 642, many years before held that under the language of **Section 6155** of the **Arkansas Code** a fraternal insurance company was not liable for an attorney's fee for failure to pay claims due by it.

The question in this case is not whether the petitioners are **fraternal benefit societies** or **accident insurance companies**, but whether under **Tennessee law** they are governed by **Section 6434** of the **Tennessee Code**, as held by the Tennessee Supreme Court, the United States District Judge, and the United States Court of Appeals for the Sixth Circuit.

CONCLUSION.

Section 6434 of the **Tennessee Code** does not make the mere refusal to pay sufficient evidence of bad faith to justify the added recovery. It requires that bad faith and proof of subsequent additional loss be shown. The additional liability provided for attaches only in the case of bad faith on the part of the insurer.

Supreme Ruling of the Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292;

Globe Indemnity Co. v. Union Planters Bank & Trust Co., 27 Fed. (2d) 496.

"Not in good faith" implies a lack of good or moral intent, as the motive for refusal to pay the loss, and describes a state of mind which underlies and causes the act of refusal to pay.

Silliman v. International Life Ins. Co., 135 Tenn. 646, 188 S. W. 273;

Columbian National Life Ins. Co. v. Harrison, 12 Fed. (2d) 986.

The petitioners, in a fair and impartial trial before the United States District Judge and a jury, were found guilty of acting "not in good faith" and a lack of good or moral intent as the motive for refusal to pay to respondent the amount of insurance for which petitioners had insured the life of respondent's husband against death by accidental means. The Circuit Court of Appeals for the Sixth Circuit, within four days after this cause was argued and submitted, affirmed the judgment of the District Court, holding no error was committed in the trial and that petitioners were liable for the additional loss or damage occasioned respondent by reason of petitioners' refusal in bad faith to comply with their contracts of insurance. They make no contention to the contrary in this Court, but insist that the Legislature of Tennessee did not intend by **Section 6434** of the **Code** to protect policyholders against what in effect is a fraud when fraternal benefit associations or societies refuse in bad faith to pay their contractual obligations. Certain it is that this position is not appealing to the Court to invoke its **discretionary power** to grant a writ of certiorari to disturb the concurrent judgment of the two lower courts.

For the foregoing reasons we respectfully submit that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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